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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 LYCURGAN INC. dba ARES ARMOR,

12 Plaintiff

13 v.

14 B. TODD JONES, in his official capacity
as Head of the San Diego Bureau of
15 Alcohol, Tobacco, Firearms and
Explosives; and DOES 1-10,

16 Defendants.
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Case No.: 14CV1679 JLS (BGS)

DEFENDANT'S REPLY TO
PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS AMENDED
COMPLAINT

DATE: January 7, 2016

TIME: 1:30 p.m.

Hon. Janis L. Sammartino

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20 I

21 INTRODUCTION

22 Subsequent to the filing of ATF's motion to dismiss, the Ninth Circuit
23 dismissed Plaintiff's appeal. That dismissal moots the first argument in ATF's motion
24 to dismiss and permits this Court to rule on the viability of Plaintiff's "Verified
25 Petition for Return of Property" (ECF #34).

26 But, as further argued in ATF's motion to dismiss, Plaintiff's Petition is not
27 viable. To the contrary, the relief sought by Plaintiff's Petition (i.e. an order directing
28 ATF to return the EP80 lower receivers seized from Plaintiff) is moot because ATF is

1 not asserting any legal right to retain the EP80s and has agreed and endeavored to
2 return them. If, as Plaintiff claims, 18 of the approximately 5,800 EP80s seized from
3 Plaintiff were lost, stolen, miscounted, or are otherwise unaccounted for, then that is a
4 question of whether ATF is liable to Plaintiff in damages, which is beyond the scope
5 of Plaintiff's Petition for equitable relief. The Court therefore should dismiss
6 Plaintiff's Petition because the relief it seeks – an order directing the return of the
7 EP80s – is moot.

8 II

9 ARGUMENT

10 A. The Ninth Circuit's Dismissal of Plaintiff's Appeal Returned Jurisdiction 11 to this Court

12 Subsequent to the filing of ATF's motion to dismiss, the Ninth Circuit
13 dismissed Plaintiff's appeal. Jurisdiction over this case was then returned to this
14 Court. ATF agrees that the first argument in ATF's motion to dismiss is moot.

15 B. Plaintiff's Claim that CAFRA and Fed. R. Crim. P. 41 Require ATF to 16 Return the EP80s is Moot Because ATF is Not Asserting any Right to 17 Retain Them and has Agreed to Return all EP80s in its Possession

18 Plaintiff's Petition seeks an injunction "command[ing] Defendant to release the
19 18 unreturned [EP80s] forthwith and without delay." ECF # 34 at 10. But ATF is not
20 asserting any right to continue to hold any EP80s, and has agreed and endeavored to
21 return all in its possession to Plaintiff. See Declaration of Resident Agent in Charge
22 Armando Hernandez (ECF #39-2) at ¶¶ 6, 7. Where, as here, the requested equitable
23 relief seeks the identical action that a defendant has agreed to perform (e.g., return all
24 property in its possession), the case is moot. See, e.g., Tellez-Sanchez v. United
25 States, 2014 WL 3339800, *3 (D. Az. 2014) ("Because Defendant attests that the
26 subject property is no longer in its possession, the Court is unable to order the return
27 of property and, to the extent the motion seeks an order requiring Defendant to
28 provide the [property] to Plaintiff, the motion is moot."); United States v. Corniel-

1 Reyes, 2008 WL 1767057, *1 (D. Nev. 2008) (“The Court denied Defendant’s motion
2 for return of seized property as moot because the Government indicated that it would
3 instruct for the money to be released upon receipt of the name and address for the
4 designated recipient for the money.”).

5 Although Plaintiff points out (correctly) that the number of EP80s that ATF
6 returned to Plaintiff (5,786) is not the same number reflected on the inventory from
7 the seizure (5,804), see Opp. at 1, that is not because ATF is asserting a right to retain
8 any EP80s (it is not). And a dispute over lost, stolen, misappropriated, destroyed, or
9 otherwise unaccounted for seized property does not create a live case or controversy
10 over Plaintiff’s entitlement to an order directing the property when that issue is not in
11 dispute. See Tellez-Sanchez, 2014 WL 33380, *3; In re National Mass Media
12 Telecomm. Sys., 152 F.3d 1178, 1180 (9th Cir. 1988) (sale of debtor’s property to a
13 non-party renders claim moot if debtor seeks only return of his property); United
14 States v. White, 718 F.2d 260, 261 (8th Cir.1983) (“since the government does not
15 possess White’s property, it cannot return his property, and the motion was properly
16 denied”). Cf. Ordonez v. United States, 680 F.3d 1135, 1137-39 (9th Cir. 2012)
17 (considering only whether money damages were available under Fed. R. Crim. P.
18 41(g) where “the subject property was lost or destroyed”) (Sammartino, J., sitting by
19 designation).

20 The 18 EP80 discrepancy presents, at most, a question of ATF’s liability in
21 damages (depending on whether the EP80s were lost, stolen, or simply miscounted).
22 But Plaintiff’s Petition does not seek damages, and, moreover, any claim for damages
23 against ATF must generally be brought, in the first instance, as an administrative
24 claim. See 28 U.S.C. § 2675(a) (“An action shall not be instituted upon a claim
25 against the United States for money damages for injury or loss of property . . . caused
26 by the negligent or wrongful act or omission of any employee of the Government . . .
27 unless the claimant shall have first presented the claim to the appropriate Federal
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agency”); Ordonez, 680 F.3d at 1138-39 (agreeing with “[e]ight other circuits . . . that sovereign immunity bars an award of money damages against the government on a Rule 41(g) motion where property cannot be returned.”).

C. Plaintiff’s Procedural Objections to ATF’s Motion Are Without Merit

Attempting to forestall a mootness-based dismissal, Plaintiff claims that ATF’s motion “is more properly viewed as a motion for failure to state a claim under Rule 12(b)(6),” not Rule 12(b)(1). Opp. at 2. Plaintiff is incorrect. See, e.g., White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000) (“Because standing and mootness both pertain to a federal court’s subject-matter jurisdiction under Article III, they are properly raised in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1)”). And, unlike a 12(b)(6) motion, the Court may consider extrinsic evidence in resolving a 12(b)(1) motion. Id.

Plaintiff further attempts to delay a dismissal on mootness grounds by citing In re Wilshire Courtyard, 729 F.3d 1279, 1284 n. 4, and Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004) for the proposition that “[W]hen the question of jurisdiction and the merits of the action are intertwined, dismissal for lack of jurisdiction is improper.” Opp. at 2. But the very next sentence in Safe Air defines when such intertwining is present: “The question of jurisdiction and the merits of an action are intertwined where a statute provides the bases for both the subject matter jurisdiction of the federal court and the plaintiff’s substantive claim for relief.” 373 F.3d at 1039 (internal quotation omitted).

No such statutory intertwining is typically present when the issue is one of mootness, which is not rooted in any statute. And, consistent with this result, mootness was not the basis for the jurisdictional challenge in either In re Wilshire Courtyard or Safe Air.

The jurisdictional issue in Safe Air concerned whether grass residue was a “solid waste” regulated by the Resource Conservation and Recovery Act (RCRA). Id.

1 at 1037. If so, then the federal court had jurisdiction under RCRA and the statute was
2 violated. Id. at 1037-40. If not, then RCRA did not cover the challenged conduct and
3 (according to defendant) the federal court lacked subject matter jurisdiction over the
4 case. The Ninth Circuit held that, in this situation, where the jurisdictional and
5 statutory issues were the same, the issue is properly resolved on the merits rather than
6 in a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). Id. at 1040.

7 The jurisdictional issue in In re Wishile Courtyard concerned whether a
8 bankruptcy court had jurisdiction to reopen a closed case to rule on the tax
9 consequences of the bankruptcy reorganization. Id. at 1282-83. The Ninth Circuit
10 held that the jurisdictional and merits questions were intertwined because both
11 “involve[d] difficult questions about overlapping state tax and federal bankruptcy
12 laws” that “rest[ed] on the need to interpret the Plan and Confirmation Order to
13 resolve the merits questions.” Id. at 1284.

14 Unlike the disputes over federal subject matter jurisdiction in In re Wilshire
15 Courtyard and Safe Air, the jurisdictional issue here is one of mootness (i.e., whether
16 Plaintiff’s request for an order directing ATF to return the EP80s is moot because
17 ATF has agreed and endeavored to return them), which does not implicate the merits
18 of the case (i.e., whether CAFRA or Fed. R. Crim. P. 41(g) would require the return of
19 the EP80s if ATF were asserting a right to retain them). Because ATF is not asserting
20 any right to retain any EP80s, there is no reason for the Court to issue an advisory
21 opinion over whether ATF could keep any of the EP80s if, hypothetically, it was
22 asserting a right to do so. If Plaintiff were to prevail and obtain the equitable relief
23 sought in its “Verified Petition for Return of Property,” the judgment would say
24 exactly what ATF has already agreed and endeavored to do: return all EP80s in its
25 possession. For this reason, the equitable relief sought in Plaintiff’s Petition is moot.
26 See generally Already, LLC v. Nike, Inc., 133 S. Ct. 721, 727 (2013) (“the case is
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moot if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.").

D. The Court Should Dismiss Plaintiff's CAFRA Claim for Relief

As discussed in ATF's opening brief (pp. 8-9), the CAFRA allegations in Plaintiff's Verified Petition are virtually identical to those in Plaintiff's original complaint, which this Court has twice dismissed. Plaintiff attempts to overcome the Court's prior orders by attempting to distinguish In re Matthews, 395 F.3d 477 (4th Cir. 2005), which the Court found persuasive in its initial dismissal order. Compare Opp. at 7-8, with Order Granting Defendant's Motion to Dismiss (ECF #19) at 6. Specifically, Plaintiff argues that CAFRA applies (and compels return of the EP80s) because it is bringing the CAFRA claim after the United States has elected not to file a civil forfeiture action. Opp. at 7-8. But those same circumstances were present when Plaintiff filed its initial CAFRA complaint, and, therefore, provide no basis for departing from the law of this case. See School Dist. No. 1J, Multnomah County v. ACandS, Inc., 5 F.3d 1255, 1262-63 (9th Cir. 1993) ("Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or if the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law.").

On the merits, and as this Court has twice ruled, CAFRA does not apply because ATF seized the EP80s pursuant to a criminal search warrant and (until they were returned) held them as evidence in connection with a criminal investigation. See Order Denying Motion for New Trial (ECF #33) at 4 ("the Court's order on the motion to dismiss makes clear that the Court did not base its decision on whether the seized items would be returned. Rather, the Court found that because the ATF voluntarily dismissed its forfeiture action, the Court's jurisdiction over the forfeiture action was divested."). Accord Celata v. United States, 334 Fed. Appx. 801, 802 (9th Cir. 2009) (unpublished) (CAFRA does not provide a jurisdictional basis to compel

1 government to return property seized pursuant to a validly executed search warrant).
2 Nothing in In re Matthews is to the contrary, as this Court ruled the first time it
3 dismissed Plaintiff's CAFRA claim. See Order Granting Defendant's Motion to
4 Dismiss (ECF #19) at 6 ("the Court finds persuasive the principle announced in *In re*
5 *Matthews*, that when the government voluntarily dismisses a forfeiture action the
6 district court's jurisdiction over the forfeiture action is divested. This principle
7 applies regardless of whether the case is voluntarily terminated before or after the
8 filing of a forfeiture complaint.").

9 III

10 CONCLUSION

11 For the foregoing reasons, the Court should grant the ATF's motion to dismiss.

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13 DATED: December 17, 2015

Respectfully submitted,

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